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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 157

WILLIAM ARCHIBALD HEDRICK,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

JEREMIAH F. CROSS,
Counsel for Petitioner.

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COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petition of William Archibald Hedrick prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled action on March 15, 1946, affirming a decision of the Tax Court of the United States.

Opinions Below

The memorandum opinion of the Tax Court of the United States (R. 10-13), has not been reported. The opinion of the Circuit Court of Appeals (R. 23-25) is not yet reported

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether compensation due for services already performed, and which has been refused or waived, is taxable income.

Statutes and Regulations Involved

Internal Revenue Code:

Sec. 22. GROSS INCOME.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. • • •

(26 U. S. C. 1940 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)—2. Compensation for personal services.—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and

other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; * * *

Statement

The facts, found in the memorandum opinion of the Tax Court of the United States, entered May 21, 1945, are as follows:

At the beginning of the tax year 1941, the petitioner was employed by the New York Telephone Company at a salary of $45.00 per week. On June 10th of that year the petitioner was notified by his employer, that his employment would terminate as of that date and that he was eligible for retirement pay under an employees' pension plan established voluntarily by the Company, under which plan a retired employee was "given" three months "pre-retirement leave" with pay, and was thereafter eligible to receive certain other retirement pay (R. 11).

The petitioner was furnished a form on which to make application for such retirement (R. 10).

He refused to sign the application and told a Company official that he would not accept such benefits (R. 10).

Despite the refusal to make application for the proffered gift of pre-retirement pay, or pension, and the petitioner's renunciation of all tendered benefits, the Company, nevertheless, sent to the petitioner checks for approximately $603.00 or an amount equal to three months full pay. The checks were never cashed (R. 11).

The funds are held by a trust company as agent for the Company.

The petitioner did not deny that checks in the approximate amount of $603.00 had been received, but the petitioner never accepted the checks, has at all times disclaimed any intention of doing so, and would have "nothing to do with them" (R. 11).

The Tax Court of the United States held that the Commissioner did not err in adding the amount of $603.00 to the taxpayer's compensation for 1941. Therefore, there was a deficiency in the sum of $202.01 for 1941. The Circuit Court of Appeals for the Second Circuit in its opinion, affirmed the decision of the Tax Court.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred—

1. In holding that the taxpayer could not refuse to accept offered compensation for services already performed.

2. In holding that the taxpayer could not waive or refuse compensation for services, unless the taxpayer refused such compensation before he performed the services and the company acquiesced therein.

3. In holding that the taxpayer could not refuse to accept the checks because they were given in satisfaction of a matured obligation.

4. In affirming the order of the Tax Court of the United States.

Reasons for Granting the Writ

The Court below admitted a conflict with the decision of the Circuit Court of Appeals, Ninth Circuit in the case of *Commissioner* v. *Giannini,* 129 Fed. (2d) 638.

Chase, J., writing for the Court below said:

> "Perhaps Com'r v. Giannini, Cir. 9, 129 F. (2d) 638 may be distinguished on the facts. If, as we understand them, the amount sought to be taxed as income was offered compensation which the taxpayer refused *before* he performed the services for which he might have been so paid and the bank acquiesced in the taxpayer's insistence that he should serve for the remain-

> der of the year without additional compensation, we agree with it. In so far as it cannot be *so* distinguished, we are not persuaded that it should be followed" (R. 24-25) (Italics supplied).

The facts in both cases are similar but the issue upon which both decisions turned, is precisely the same.

In the *Giannini* case the taxpayer had a contractual right to receive five per cent of the net profits earned by the bank, his employer, during the calendar year. The taxpayer refused to accept payment of compensation for the services which he had already performed up to November of that year, and he did also refuse to accept payment for services to be performed thereafter during the balance of the calendar year.

In the case at bar the Court held that "pre-retirement pay" was a concomitant of the job the taxpayer held, and therefore was earned compensation.

In the *Giannini* case the taxpayer had a right to draw the earned compensation, but refused to do so.

In the instant case the Court below held that the taxpayer was entitled to draw "pre-retirement pay" and although he renounced this right, and refused to accept or have anything to do with checks sent to him by his employer thereafter, he could not avoid the tax consequence, because the obligation had matured for services already performed.

In the *Giannini* case it was held that earned compensation could be refused. In this case, the Court below held that it could not. The conflict should be resolved by a determination of this Court.

The question is one of importance in administering the tax laws, and has not heretofore been presented or decided.

This adventure of the Commissioner of Internal Revenue

in the collection of income taxes, by use of the invented "constructive receipt" doctrine, should be considered by this Court.

WILLIAM ARCHIBALD HEDRICK,
Petitioner.

JEREMIAH F. CROSS,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 157

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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The memorandum opinion of the Tax Court (R. 10–13) is not reported. The opinion of the Circuit Court of Appeals (R. 23–25) is reported at 154 F. 2d 90.

JURISDICTION

This case involves a deficiency in income tax for the year 1941. The judgment of the Circuit Court of Appeals, which affirmed the decision of the Tax Court, was entered on March 15, 1946. (R. 25.) The petition for a writ of certiorari was filed on June 10, 1946. The jurisdiction of this

Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the amount of money represented by checks received by the taxpayer during the taxable year from his employer for "pre-retirement leave with pay" should be included in his taxable income where, although the taxpayer did not want to accept the pension and refused to cash the checks, he failed to return the checks.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

(26 U. S. C. 1940 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.22 (a)–2. *Compensation for personal services.*—Commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients; * * *.

STATEMENT

The facts as found by the Tax Court are as follows:

At the beginning of the taxable year 1941 the taxpayer, who was then 57 years old, was employed by the New York Telephone Company at a salary of $45 per week. In June of that year he received notice that his active employment with the company would terminate and that he was eligible for retirement pay under an employees' pension plan then in operation, and was furnished a form on which to make application for such retirement pay. The taxpayer refused to sign the application because he did not want to retire at his age and would not accept any pension because he thought that this might bar him from other employment. He sought reinstatement to active duty with the Telephone Company but was unsuccessful. Since that time he has been employed by other concerns, and according to his testimony, has "done fairly well." (R. 10–11.)

In his tax return for 1941, taxpayer reported salary from the Telephone Company of $1,170 which the Commissioner increased to $1,773. Frank M. Downey, an employee of the Telephone Company who was also secretary of the company's Employees' Pension Committee, testified that in June, 1941, the company had in operation a plan under which a retired employee was given three months' "pre-retirement leave" with pay and that checks for approximately $603, or three months' pay, were sent to the taxpayer in 1941 after he was separated from active service. He further testified that pension checks were still being sent to the taxpayer under a pension plan put into effect soon after the latter left the company. The taxpayer did not deny having received checks in the amount of $603 in 1941. He testified that he had never returned any of the pension checks to the Telephone Company or to the issuing bank which acted as agent for the company in handling the pension trust and that he still had some of the checks in his possession. He did not know how many of the checks he still had or what had become of the others. (R. 11.)

On these facts, the Tax Court held that the Commissioner did not err in adding the amount of $603 (representing the "pre-retirement leave" with pay) to the taxpayer's compensation for 1941. (R. 12.) Accordingly, it found that there was an income tax deficiency in the amount of $212.01 for 1941. (R. 14.)

ARGUMENT

1. The decision below follows the rulings of this Court and is correct. Upon the receipt of the checks in controversy, which the taxpayer could have cashed immediately and which represented payment of an obligation owing to him, the taxpayer realized taxable income since the money became subject to his unqualified command at that time. *Avery* v. *Commissioner,* 292 U. S. 210. The fact that the taxpayer has not, as yet, cashed the checks does not make them any the less his income at the time when received. The decisions unanimously demonstrate that income which is subject to a taxpayer's enjoyment or command is taxable to him regardless of whether he fails to use it himself or diverts its use to others. *Corliss* v. *Bowers,* 281 U. S. 376; *Lucas* v. *Earl,* 281 U. S. 111; *Helvering* v. *Horst,* 311 U. S. 112; *Helvering* v. *Eubank,* 311 U. S. 122; *Harrison* v. *Schaffner,* 312 U. S. 579. As the Court stated in *Corliss* v. *Bowers, supra* (p. 378):

> The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not. * * *

2. The alleged conflict which the taxpayer relies on between the decision below and *Commissioner* v. *Giannini,* 129 F. 2d 638 (C. C. A. 9th), does not exist, the cases being distinguishable in several respects. In the *Giannini* case, the sum

which the Commissioner sought to tax was never received by the taxpayer, and was never set apart for his use or credited to him on the company's books. Opposed to that is the uncontradicted fact in the present case that the checks were received by the taxpayer and were available for his use. Also, in the *Giannini* case it was found that after the taxpayer's refusal to accept the compensation and his suggestion that the company devote the amount to some useful purpose, the company was relieved of any obligation to pay him and was free to dispose of the money as it saw fit. In the present case, as the Tax Court observed (R. 12–13), the taxpayer may still cash the checks and the payor's agent still holds the funds which they represent. Finally, it is to be observed that neither the *Giannini* case nor the present case decided the proposition which the taxpayer relies on as establishing a conflict in decisions, namely (Pet. 4–5), whether refusal to accept earned compensation results in the receipt of taxable income. As the court pointed out in that case (129 F. 2d 638, 641, footnote 1, and see the concurring opinion of Judge Healy), the refusal to accept any compensation for the last half of 1927 took place in 1927 and the only taxable year before the court was 1928. Thus, the decision in that case was based on the conclusion that the taxpayer's refusal to accept the compensation was not followed by anything in 1928 showing con-

structive receipt of income in that year, nothing having been received by the taxpayer and the court having concluded that he did not direct the charitable disposition of the money which the corporation actually made. In the present case, on the contrary, the refusal to accept the compensation was followed by the receipt of checks which the taxpayer has retained, and there was a constructive receipt of income in the taxable year.

Although the correctness of the *Giannini* case is open to serious question, as the opinion of Judge Chase herein indicates (R. 24–25), and although there is some diversity of approach between the two circuits, the decision is nevertheless distinguishable in the respects noted above and therefore does not call for certiorari.

CONCLUSION

The decision below is in accord with familiar principles. There is no conflict in decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY, 1946

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